

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,
v.

HC RETAIL LLC dba HONOLULU
COFFEE CO.,

Respondent.

CASE NO. OSH 2010-38
Inspection No. 313080194

ORDER NO. 428

ORDER GRANTING
COMPLAINANT DIRECTOR OF
LABOR AND INDUSTRIAL
RELATIONS' MOTION TO DISMISS
RESPONDENT'S CONTEST, FILED
ON JANUARY 12, 2011

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On January 12, 2011, Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Complainant) filed a Motion to Dismiss Respondent's Contest with the Hawaii Labor Relations Board (Board) contending that the instant contest was untimely filed and the Board lacked jurisdiction over this appeal.

The Board conducted a hearing on Complainant's Motion to Dismiss Respondent's Contest on February 14, 2011. Complainant's counsel and Respondent's representative appeared before the Board. After careful consideration of the arguments, pleadings, and record in this case, the Board makes the following findings of fact, conclusions of law, and decision and order granting Director of Labor and Industrial Relations' Motion to Dismiss Respondent's Contest, for the reasons discussed below.

FINDINGS OF FACT

1. On June 21, 2010, a Hawaii Occupational Safety and Health, State of Hawaii (HIOSH) inspector initiated a comprehensive inspection of Respondent's workplace located at 1450 Ala Moana Blvd #3066, Honolulu, Hawaii 96814, Inspection number 313080194.
2. As a result of the inspection, on October 14, 2010, Complainant issued a Citation and Notification of Penalty (Citation) to Respondent alleging violations of the occupational safety and health standards and imposing

penalties of \$2,450.00. HIOSH issued the following citations to Respondent:

Citation 1, Item 1: Serious [\$700.00 penalty assigned]

29 CFR 1910.25(d)(2)(xv) [Refer to chapter 12-72.1, (Hawaii Administrative Rules) HAR] was violated because:

A portable 16' high aluminum ladder's side rails were about flush with the over head floor. An employee could lose his balance while ascending or descending on this ladder and he could have fallen down about 8'6" to the ground and gotten injured.

29 CFR 1910.25(d)(2)(xv) states "No ladder should be used to gain access to a roof unless the top of the ladder shall extend at least 3 feet above the point of support, at eave, gutter, or roofline";

Citation 1, Item 2: Serious [\$875.00 penalty assigned]

29 CFR 1910.304(g)(5) [Refer to chapter 12-89.1, HAR] was violated because:

The left side of a four plex wall mounded outlet box tested open ground with the 1750 woodhead tester and an employee could get a serious electrical related injury.

29 CFR 1910.304(g)(5) states "Grounding path. The path to ground form circuits, equipment, and enclosures shall be permanent, continuous, and effective."

Citation 1, Item 3: Serious [\$875.00 penalty assigned.]

29 CFR 1910.305(f)(1) [Refer to chapter 12-89.1, HAR] was violated because:

A junction/timer switch box for the Tocar Tielle "chest" type of refrigerator was missing its front cover and was exposing the bare electrical terminals and someone could get seriously injured.

29 CFR 1910.305(f)(1) states “Insulation. All conductors used for general wiring shall be insulated unless otherwise permitted in this subpart.”

Citation 2, Item 1: Other [No penalty assigned]

29 CFR 1910.23(a)(8)(ii) [Refer to chapter 12-72.1, HAR] was violated because:

The wooden floor platforms were not flushed to the walls and they created a floor hole about 4 ½" wide and exposed their employees to an unstable walking surface.

29 CFR 1910.23(a)(8)(ii) states “Every floor hole into which persons can accidentally walk shall be guarded by either:

- (i) A standard railing with standard toeboard on all exposed sides, or
- (ii) A floor hole cover of standard strength and construction. While the cover is not in place, the floor hole shall be constantly attended by someone or shall be protected by a removable standard railing.”

Citation 2, Item 2: Other [No penalty assigned]

29 CFR 1910.305(b)(2)(i) [Refer to chapter 12-89.1, HAR] was violated because:

A junction/timer box for the Tocar Tielle “chest” type of refrigerator was missing its front metal cover.

29 CFR 1910.305(b)(2)(i) states “All pull boxes, junction boxes, and fittings shall be provided with covers identified for the purpose. If metal covers are used, they shall be grounded. In completed installations, each outlet box shall have a cover, faceplate, or fixture canopy.”

Citation 2, Item 3: Other [No penalty assigned]

29 CFR 1910.334(a)(2)(i) [Refer to chapter 12-89.1, HAR] was violated because:

The power cord's outer insulation was all frayed exposing the inner insulated wires for a junction/timer box for the Tocar Tielle "chest" type of refrigerator.

The power cord's outer insulation was separated about ½" from the attachment plug for the Nuova Simonelli Super Grill Appliance Machine.

29 CFR 1910.334(a)(2)(i) states "Visual inspection. Portable cord- and plug-connected equipment and flexible cord sets (extension cords) shall be visually inspected before use on any shift for external defects (such as loose parts, deformed and missing pins, or damage or outer jacket or insulation) and for evidence of possible internal damage (such as pinched or crushed outer jacket). Cord- and plug-connected equipment and flexible cord sets (extension cords) which remain connected once they are put in place and are not exposed to damage need not be visually inspected until they are relocated."

3. The Citation was sent by certified mail via the United States Postal Service on October 14, 2010 addressed to Mr. Sam Suiter, Operations Manager, HC Retail, LLC, dba Honolulu Coffee Co., with return receipt requested to Respondent's listed mailing address of 1450 Ala Moana Boulevard, #3066, Honolulu, Hawaii 96814.
4. On October 15, 2010, Sam Suiter, Operations Manager, HC Retail, LLC, dba Honolulu Coffee Co., acknowledged receipt of the October 14, 2010 certified letter containing the Citation.
5. The Citation informed Respondent of its right to contest, providing in relevant part:

Employers' Right to Contest – You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest penalties and/or abatement dates without contesting the underlying violations. **Unless you inform the Administrator in writing that you intend to contest the citation(s) and/or penalty(ies) within 20 calendar days after receipt, the citation(s) and the penalty(ies) will become a final order of the Department of Labor and**

Industrial Relations and may not be reviewed by any court or agency. Once a letter of contest is received, it becomes the jurisdiction of the [Board]. (Emphases original).

6. By letter dated October 19, 2010, HIOSH Occupational Safety Branch Supervisor Clayton Chun (Chun) sent a Reminder to Employer, addressed to Mr. Sam Suiter, reminding Respondent that on October 14, 2010, citations were mailed for violations of HIOSH Standards; penalties may have accompanied the violations; advised of abatement responsibilities and to review material for rights with regard to informal conferences, contests with the Appeals Board, and requests for more time to correct violations.
7. By letter dated November 15, 2010, Ed Schultz (Schultz), Respondent's President and Owner, wrote to Complainant advising that he left on October 14, 2010 for a two-week vacation and returned on November 1, 2010; the "complaint" was in his pile of mail when he returned; that Respondent addressed the issues and took pictures of the corrections and sent a package to the Complainant which arrived on November 10, 2010; Chun informed him that he had missed the 20-day window and could not contest the penalties; Chun suggested that Schultz write to Complainant, and requested Complainant to consider waiving the penalties. The envelope containing the foregoing letter was postmarked on November 17, 2010.
7. The Board finds that the Citation resulting from Inspection number 313080194 was issued by HIOSH on October 14, 2010, and sent via certified mail to Respondent's business address; and the Citation was received by Respondent on October 15, 2010. The deadline for Respondent to have properly contested the Citation was November 4, 2010.¹ Viewing the facts in the light most favorable to Respondent for the purposes of this motion to dismiss and treating Respondent's November 15, 2010 letter as a Notice of Contest, the Board finds that Respondent did not contest the Citation until the letter was sent and post-marked, on November 17, 2010.
8. At the hearing on the Director of Labor and Industrial Relations' Motion to Dismiss Contest, Respondent submitted that all violations had been corrected. Based on the record, the Board finds Respondent's contest of the

¹Schultz returned from his vacation on November 1, 2010, prior to the expiration of the twenty-day contest period.

Citation is untimely,² and therefore the Board lacks jurisdiction over the appeal.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over appeals from HIOSH citations pursuant to Hawaii Revised Statutes (HRS) §§ 396-3 and 396-11.
2. The Hawaii Supreme Court has held that the right of appeal is purely statutory, and therefore the right of appeal is limited as provided by the legislature and compliance with the method and procedure prescribed by it is mandatory. In re Tax Appeal of Lower Mapunapuna Tenants Assn., 73 Haw. 63, 69, 828 P.2d 263, 266 (1992).
3. In Si-Nor, Inc. v. Director, Dept. of Labor and Indus. Relations, 120 Hawai'i 135, 145, 202 P.3d 596, 606 (2009), the Hawaii Intermediate Court of Appeals cited with approval the following quote from Love v. College Level Assessment Services, Inc., 928 S.W.2d 36, 38 (Tenn. 1996):

[T]he timely perfecting of an appeal is no mere technical formality: it is in fact a mandatory requirement, and if it is not complied with, the court has no jurisdiction over the case.

4. To the extent the failure to timely perfect an appeal divests an appellate body of jurisdiction, such failure cannot be waived by the parties or the appellate body. See State v. Johnston, 62 Haw. 9, 619 P.2d 1076 (1980) ("A jurisdictional defect in an appeal cannot be waived by the parties or disregarded by us.").
5. Similarly, HRS 396-11, provides in relevant part:
 - (a) Any citation, proposed penalty, or order of the director shall be final and conclusive against the employer unless the employer files with the director a written notice of contest of the citation, the abatement period stated in the citation, the proposed penalty, or order within twenty days after receipt of the citation, proposed penalty, or order.

²See Micro Lapping & Grinding Co. v. Unemployment Comp. Bd. of Review, 486 N.E.2d 225, 227 (Ohio Ct. App. 1984) ("The requirement that a mailed application to institute a further appeal be 'postmarked' prior to the running of the appeal time, has been limited to a post office postmark.").

6. HAR § 12-51-19, governing employer contests of citations, provides (emphasis added):

Employer contests of citation, proposed penalty or both. Any employer to whom a citation and notice of proposed penalty has been issued may petition the director for review of the citation and notice pursuant to the rules of the appeals board within twenty days of the receipt by the employer of the notice of proposed penalty. Each notice of contest shall specify whether it is regarding the citation, the proposed penalty, or both. This petition shall be an original, and shall be served on the director and must be postmarked, or if not mailed, received by the director within twenty calendar days of the receipt by the employer of the citation and notice of proposed penalty. If not mailed, the date of receipt by the director shall be the date stamped on the contest by the director. The department will forward a copy of the petition to the appeals board. A de novo hearing shall be held by the appeals board. Copies of each petition shall be posted where they shall be readily observed by all affected employees.

7. The Citation resulting from Inspection number 313080194 was issued by HIOSH on October 14, 2010, and sent via certified mail to Respondent's business address; and the Citation was received by Respondent's representative, on October 15, 2010. The deadline for Respondent to have properly contested the Citation was twenty days thereafter or November 4, 2010. However, Respondent did not contest the Citation until the letter dated and post-marked on November 17, 2010. The Board concludes that the instant contest is untimely.
8. Respondent's contest of the Citation is untimely, and therefore the Board lacks jurisdiction over this appeal.

ORDER

For the reasons discussed above, the Board hereby grants the Director of Labor and Industrial Relations' Motion to Dismiss Respondent's Contest, filed on January 12, 2011.

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DATED: Honolulu, Hawaii, April 15, 2011.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member



NORMAN K. KATO II, Member

Copies sent to:

Robyn M. Kuwabe, Deputy Attorney General
Ed Schultz